INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	9
Conclusion	15

CITATIONS

Cochran and Sayre v. *United States*, 157 U. S. 286	15
Commonwealth v. *Smith*, 163 Mass. 411	10
Hagner v. *United States*, 285 U. S. 427	15
Morton Butler Timber Co. v. *United States*, 91 F. (2d) 884	11
Raffel v. *United States*, 271 U. S. 494	10
Rosen v. *United States*, 161 U. S. 29	15
Tomlinson v. *United States*, 93 F. (2d) 652, certiorari denied, 303 U. S. 646	10
United States v. *Bob*, 106 F. (2d) 37, certiorari denied, 308 U. S. 589	14
United States v. *Buckner*, 108 F. (2d) 921, certiorari denied, 309 U. S. 669	10
United States v. *Dilliard*, 101 F. (2d) 829, certiorari denied, 306 U. S. 635	14

325727—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 72

GEORGE T. MORTIMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 3494–3501) is reported at 118 F. (2d) 266.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 2, 1941 (R. 3501). The petition for writ of certiorari was filed May 6, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also rule XI of the

Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, when the credibility of the accused as a witness is in issue, he may be asked on cross-examination if he had declined an invitation to testify before the Grand Jury.

2. Whether reversible error resulted from the admission of certain evidence objected to as incompetent hearsay, the evidence being cumulative and the guilt of the accused established overwhelmingly by other competent evidence.

3. Whether the conspiracy count was fatally defective for indefiniteness and uncertainty.

STATEMENT

An indictment in fourteen counts was returned in the United States District Court for the Southern District of New York against the petitioner and five other officers of the New York Title and Mortgage Company, together with that company and certain of its subsidiary corporations (R. 19–40). The first thirteen counts charged substantive violations of the mail fraud statute (Criminal Code, Sec. 215; U. S. C., Title 18, Sec. 338); the fourteenth a conspiracy to violate that statute (Criminal Code, Sec. 37; U. S. C., Title 18, Sec. 88).

It was alleged in the indictment that the defendants devised a scheme and artifice for the obtaining

of money and property by means of false and fraudulent pretenses, representations, and promises, in connection with the sale of mortgages and certificates issued, sold, and distributed by the New York Title and Mortgage Company, and that the representations were made by means of newspaper advertisements, circulars, letters, and in other ways.

After a trial which lasted twelve weeks (R. 8, 14), verdicts of guilty were returned on various counts against petitioner and two of the other defendants (R. 14, 2477). Three of the substantive counts had been dismissed by the Government (R. 11).[1] Petitioner was convicted on eight of the substantive counts and on the conspiracy count and was sentenced to two years' imprisonment on each count, to run concurrently, and on the conspiracy count was, in addition, fined $5,000 (R. 2, 14, 16–17, 2477, 2484). Petitioner is the only defendant who appealed.

The New York Title and Mortgage Company was engaged in the lending of money on the security of mortgages on real estate in Metropolitan New York and the sale of such mortgages or of certificates of participation therein to the public. It continued in business until March 14, 1933, when the New

[1] Of the three remaining individual defendants, one pleaded guilty (R. 9, 47), one died prior to trial (R. 8, 43), and one was acquitted (R. 14, 2477). The indictment was dismissed as to the corporate defendants (R. 14–15, 2478–2479).

York Superintendent of Insurance prohibited its further sale of securities (R. 475). On August 4, 1933, he took the company over for rehabilitation (R. 1317). Petitioner was the president of the company from June 1, 1930 (R. 1562), to December 1, 1932 (R. 1596), continued to receive his salary as president until June 1, 1933 (R. 1596), and served as a director for some time after he had resigned as president.

The company engaged in an intensive and aggressive selling campaign during 1931 and 1932, its advertising outlay for these two years exceeding $240,000 (R. 476). This campaign was carried on through newspaper advertising (R. 2557–2726), circular letters (R. 57, 2727a), pamphlets (R. 123–124), and salesmen (R. 48–57, 169–176). The entire campaign sought to convey to prospective purchasers one basic idea: that the company's mortgages and mortgage certificates were adequately secured and eminently safe. Playing upon the distrust of securities by small investors following 1929, such expressions were used as "An Investment Over 150 per cent Secure—Every Dollar you Invest in our Five per cent Guaranteed First Mortgages and Certificates is secured by a first lien on improved New York Real Estate worth more than one and one-half times the amount of the mortgage" (R. 2600); "The bond of a responsible borrower protects you against the possibility of loss" (R. 2724); "*guaranteed* safety of principle and unfailing income" (R. 3194); "legal investments for

savings banks in the State of New York" (R. 2530–2531); "the ideal investment for trust funds" (Exs. 383, 384, 387); "depression-proof" R. 2560); "storm-proofed" (R. 2724).

However, as the Circuit Court of Appeals said, "these assurances were quite false" (R. 3495). The company was insolvent or in a condition approximating insolvency for many months before petitioner resigned as president on November 30, 1932. In June 1931 real estate values declined drastically (R. 2084). In November 1931 the company invoked a clause permitting it to delay payment on participation certificates after maturity,[2] unpaid calls accumulated rapidly (R. 650–652), and petitioner admitted that by the beginning of 1932 the company's financial situation had become alarming (R. 1731–1732, 1735–1756). Nevertheless the sale of certificates continued to be energetically pushed on representations of absolute safety (R. 3194). All of this was forcibly brought home to petitioner at the time (R. 2823–2843).

Despite the representations made in the company's advertising, certificates continued to be issued against mortgages which had already fallen into default and which subsequently had to be

[2] After the company had invoked the delayed payment clause, the company, on instructions of petitioner and other officers (R. 1378), was repurchasing certificates in the open market at discounts ranging from five to thirty percent (R. 3074), and reselling them to the public at par (R. 653–654).

foreclosed (R. 605–606, 607, 609). By the end of 1932 the percentage of defaults in four group issues ranged from 65.8 percent to 91 percent (Exs. 691, 700, 703, 714). A large part of these were a year or more in default.

The existence of defaults was purposely concealed both from prospective purchasers (R. 1462, 1959) and salesmen (R. 165, 172–173). Specific inquiries were answered equivocally or falsely (R. 1459–1462). For instance, a certificate holder's question, "Are any of the mortgages upon which these certificates are founded in default or under foreclosure?" (R. 3179) was answered, as to one of his certificates, "If a mortgage deposited under this issue is foreclosed, it is removed from deposit and a mortgage in good standing is substituted" (R. 3177) at a time when over $9,000,000 in mortgages of this series were under foreclosure, assignments of rents, or in arrears (Ex. 692).

Although the advertising literature emphasized that the properties mortgaged were always worth 150 per cent of the amount of the mortgages on the basis of current appraisals (R. 79, 165), on instructions from petitioner and others (R. 508) appraisals were signed by persons who were wholly unfamiliar with the properties. Members of the appraisal staff inserted figures far in excess of their opinion of true valuations (R. 699, 819, 822–823). The officers arbitrarily fixed figures for appraisers to arrive at (R. 700, 822–823). Appraisals were "jacked-up" (R. 900) and generally "the appraisal

was fixed to justify the loan" (R. 518). Petitioner and others raised appraiser's figures (R. 507–508) and directed that appraisals be furnished customers higher than those on the company's records (R. 1403–1405, 1535–1536).

The power of substitution of collateral provided for in the certificates and represented as necessary to permit the withdrawal of foreclosed or paid-off mortgages from group series (R. 2551, 3177) was utilized to permit the sale of the good mortgages to astute purchasers (R. 190, 1928–1929), leaving those which were unsaleable (R. 1176). Similarly, when collateral was necessary for a loan from the Reconstruction Finance Corporation in September 1932, several million dollars of mortgages were withdrawn from the group series and other collateral, rejected by that Corporation, substituted (R. 394), thereby leaving the certificate holders very much less secure than before the loan was made (R. 1245).

Title to property acquired by the company on foreclosure was taken in the name of one of two wholly-owned subsidiaries organized by the company for that purpose (R. 248). These subsidiaries and their activities were under the sole direction of petitioner (R. 1725–1726). When the properties were taken over in this manner, new mortgages were issued on *pro forma* appraisals which again purported to show that the property had a value of one and one-half times the amount of the mortgage (R. 879, 880–886, 900, 906), although pe-

titioner would have been glad to dispose of such properties at the face value of the original mortgages (R. 1721). The parcels the company was able to sell were disposed of at substantial losses (R. 1723).

The practice of the company often belied its statement in its advertising that "The bond of a responsible borrower protect[s] you against the possibility of loss" (R. 2724). For instance, one $2,500,000 bond, payable on demand, was made by a married employee of the company receiving $35 per week (R. 226), having no interest in the property (R. 225), who testified that he "did not have a penny" (R. 227). It was the practice for the landholding subsidiaries to take title to properties on foreclosure and assign them to a "dummy" who simultaneously executed a bond and mortgage and reassigned the property to the subsidiary (R. 534–535). These subsidaries were managed by petitioner (R. 1592, 1725–1726).

Petitioner received a salary of $50,000 a year as president of the company (R. 1560). He and his family owned certain of the company's certificates, but none of them were in any of the issues involved in this case (R. 1696). While president he held no stock of the New York Title and Mortgage Company, having exchanged his shares in 1929 for stock of the Manhattan Company, which at that time acquired 98.5 percent of the stock of the mortgage company (R. 1040, 1536–1537). Although in October 1932, the Manhattan Company issued stock of

the New York Title and Mortgage Company to its stockholders as a stock dividend (R. 1537, 1595), petitioner did not have the shares to which he was entitled transferred to his own name because he did not think ~~its~~ their value justified the cost of the stock transfer tax stamps (R. 1595).

ARGUMENT

I

Petitioner contends (Pet. 16–22) that it was error to permit the Government to cross-examine him concerning his failure to accept an invitation to testify before the Grand Jury (R. 1649–1652). No inquiry was made into the motive or reason for his refusal.

As the Circuit Court of Appeals held, "The question was properly allowed since it was relevant to the issue of appellant's credibility" (R. 3497). The purport of petitioner's entire defense was that, although he was the president of the New York Title and Mortgage Company, he was entirely ignorant of any wrong-doing perpetrated in its name. (See R. 3496.) Since the validity of this defense depended largely upon the weight to be given to petitioner's own testimony, it was entirely proper for the Government on cross-examination to attack his credibility by contrasting his defense with his failure to accept the invitation to tell the grand jury his side of the case. When petitioner took the stand at his trial, his immunity against self-in-

crimination no longer survived. *Raffel* v. *United States,* 271 U. S. 494, 499; *United States* v. *Buckner,* 108 F. (2d) 921 (C. C. A. 2d), certiorari denied, 309 U. S. 669; *Tomlinson* v. *United States,* 93 F. (2d) 652 (App. D. C.), certiorari denied, 303 U. S. 646; *Commonwealth* v. *Smith,* 163 Mass. 411, 430–433.[3]

Petitioner's argument that to permit cross-examination of the type here in question would prevent a defendant from testifying on his own behalf at the trial unless he had previously testified before the grand jury (Pet. 17) is but a paraphrase of a contention rejected by this Court in the *Raffel* case, *supra,* that the questions there complained of "might operate to bring pressure upon the accused to take the stand on the first trial * * * and might influence the defendant to continue his silence on the second trial because his first silence may there be made to count against him." As this Court said, "these refinements are without substance." 271 U. S. at 499.[4]

---

[3] Certain factual distinctions which petitioner attempts to make between the first three cases and the present case (Pet. 18–19) are obviously without moment.

[4] If, as petitioner intimates, the jury was permitted by the Government's cross-examination to draw any unwarranted inference from the petitioner's failure to accept the Government's invitation to testify before the grand jury because the Government did not inquire into the reason for such failure (Pet. 19–20), the fault lay with petitioner, since, on redirect examination, he could have clarified the matter.

II

Petitioner assails, as incompetent hearsay, testimony of the Government's witness Karcher and the charts, summaries, and graphs introduced through him insofar as they related to tax arrearages because (1) Karcher's subordinates who examined the official tax records and transcribed data upon which Karcher's compilations were partially based did not all testify and (2) the tax records from the various county collectors' offices were not introduced in evidence (Pet. 22–45).

We do not believe it necessary to consider the sufficiency of the considerations adduced by the Circuit Court of Appeals to sustain the admissibility of the questioned evidence (R. 3495–3501).[5]

[5] Petitioner's argument that the Circuit Court of Appeals erroneously held that Karcher's testimony was made admissible by 28 U. S. C. Section 695 (Pet. pp. 35–44) is based upon an obvious misconstruction of the court's opinion. The court said: "There are numerous cases holding admissible on the testimony of a supervising agent statements compiled from voluminous records according to a method at once practicable and affording reasonable guaranty of accuracy, even though the supervisor had not examined each record himself" (R. 3499). After citing a number of cases in support of this proposition the court went on to say: "Obviously this rule loses none of its force by reason of the passage of the recent statute, 28 U. S. C. A., Section 695, under which writings and records made in the regular course of any business, where it is the regular course of such business to make them, are admissible in any court of the United States" (R. 3499–3500). It is apparent that the court did not base its decision on Section 695, but merely pointed out that its conclusion was consonant with that statute.

In our view, it is clear that if the evidence was inadmissible, petitioner's substantial rights were not infringed.[6]

(a) Karcher's testimony as to tax arrearages was merely cumulative. The company's records showing the tax status of each piece of mortgaged property involved were introduced in evidence (Exs. 364, 364A, 364B, 364C). Where there was a discrepancy between the records of the taxing authorities and those of the company, Karcher chose whichever showed the lesser tax deficiency (R. 564). Hence, his testimony added nothing to what was already in evidence except insofar as he showed that the tax collector's records revealed less tax arrearages than the company's own records. Such testimony was obviously favorable to petitioner.

(b) Laying aside all proof of tax arrearages, the misrepresentations alleged in the indictment were established by an abundance of other competent evidence. As has been shown in the Statement, mortgages and participation certificates were sold after the company was hopelessly insolvent; from 65.8 percent to 91 percent of the mortgages held by the company were in default; appraisals were arbitrarily "jacked-up" to justify loans; unsaleable mortgages were placed in group issues and those

[6] There is, consequently, no necessity for discussing the alleged conflict between the decision of the Circuit Court of Appeals below and that of the Circuit Court of Appeals for the Sixth Circuit in *Morton Butler Timber Co.* v. *United States*, 91 F. (2d) 884, 889, relied upon by the Petitioner (Pet. 41–42).

that later proved to be saleable were withdrawn and inferior collateral substituted; properties taken over on foreclosure were arbitrarily listed at one and one-half times the amount of the mortgage when they were actually worth less than that amount; and bonds which were supposed to protect certificate purchasers "against the possibility of loss," many of them for enormous amounts, were but the obligations of low-salaried judgment-proof "dummies", employees of the company itself. Indeed, petitioner does not dispute the fraudulent nature of the enterprise and does not here urge, as an independent ground for reversal, that he was but an innocent participant.[7]

---

[7] While the petitioner in a summary of the facts and in his reasons for the allowance of the writ refers to his good faith and asserts that his conviction rested upon nothing more than suspicion (Pet. 7–8, 11–12), these assertions are not incorporated in his specification of assigned errors to be urged (Pet. 14–15) nor discussed in his argument (Pet. 16 *et seq.*). There was abundant evidence from which the jury could conclude that the petitioner was a knowing participant in the fraudulent scheme. The by-laws of the company provided that "The president of the company shall be the administrative officer of the company and shall manage its operations and perform all the duties incidental to his office" (R. 1562). It was shown, among other things, that petitioner received reports covering every phase of the company's affairs, including arrears and defaults (R. 296, 1745, 1749–1750, 2255), foreclosures (R. 316, 1682, 1741–1742, 1745, 1748, 1749–1750), assignments of rents (R. 288, 1741–1742, 1745, 1747–1748, 1750), operations of foreclosed properties (R. 1687), daily sales and re-investments of mortgages and certificates (R. 1751–1752), itemized lists identifying all mort-

III

Petitioner argues (Pet. 48) that count 14, the conspiracy count, "is so vague, indefinite, and uncertain that it should have been dismissed." It is clear, however, that this count was well pleaded. It alleges a conspiracy occurring during a designated period and at a designated place to use the mails in furtherance of a scheme and artifice for the obtaining of money or property by means of false and fraudulent pretenses, representations, and promises, "particularly from any and all persons who would be induced to part with money and property for the purchase of mortgages and certificates issued, sold, and distributed by the said New York Title and Mortgage Company." Twelve specific overt acts are recited (R. 34–38).

---

gages as saleable or unsaleable (R. 626–627), and "trouble sheets" (R. 296, 300). A large part of the company's advertising appeared over his name (R. 127), and it was testified that all advertising was submitted to him before publication (R. 120, 123–124). After surveying all the evidence regarding petitioner's knowledge of and participation in the affairs of the company the Circuit Court of Appeals was moved to declare: "* * * indeed the question he raises as to its sufficiency seems hardly sincere" (R. 3496). Even if the evidence had been less convincing, "One who shows himself as an officer [in a company] promoting * * * fraud * * * can hardly object when the jury holds him an active participant in it." *United States* v. *Bob*, 106 F. (2d) 37, 40 (C. C. A. 2d), certiorari denied, 308 U. S. 589; see also *United States* v. *Dilliard*, 101 F. (2d) 829, 835 (C. C. A. 2d), certiorari denied, 306 U. S. 635.

That petitioner could not have been misled as to the precise nature of the scheme charged is evident from the facts that the first six of the twelve overt acts consist of the mailings charged in the first six substantive counts (R. 25–28) and that the first of these substantive counts recites the fraudulent scheme in great detail (R. 19–23). This was supplemented in further detail by bills of particulars pointing out the particular mortgages involved and the respects in which the representations were false and fraudulent (R. 41a–41ff). No attack was made on the conspiracy count until the close of the Government's case, when *pro forma* motions were made to dismiss all counts of the indictment on the ground of insufficiency (R. 1418 *et seq.*).

The conspiracy count did not omit any essential element of the offense; it sufficiently advised the petitioner of the charge against him; and the petitioner is adequately protected against a second prosecution. Cf. *Hagner* v. *United States,* 285 U. S. 427, 431; *Rosen* v. *United States,* 161 U. S. 29, 34; *Cochran and Sayre* v. *United States,* 157 U. S. 286, 290.

CONCLUSION

The case presents no question requiring review by this Court. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
Special Assistant to the Attorney General.
KEITH BROWN,
W. MARVIN SMITH,
Attorneys.

JUNE 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941